UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SCOTT FORD	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 04-150-B-W
	)	
	)	
JEFFREY MERRILL,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION

Scott Ford is seeking 28 U.S.C. § 2254 review pertaining to the revocation of his probation. Eleven of Ford's thirteen grounds pertain solely to events surrounding his probation revocation proceedings in March 2003. One of the special conditions of Ford's probation vis-à-vis the 1996 sentence was that he report to his probation officer within forty-eight hours of his release from jail. Ford was erroneously released ten days early from the New Hampshire institution where he was serving a sentence stemming from an unrelated 1995 Cumberland County criminal case. Ford's whole house of cards teeters on Ford's supposition that he was not "on probation" under the Penobscot County sentence because he never fully served his Cumberland County sentence so that the revocation of his probation for failing to report was improper. The State has filed a motion to dismiss arguing that the § 2254 petition is untimely, that the claims are unexhausted and procedurally defaulted, and, in the alternative, that they are without merit.

Discussion

After his probation was revoked Ford filed a motion to challenge the revocation of his probation in the Superior Court based on the following theory. Ford was serving a Cumberland County sentence on an unrelated 1995 offense at the time that he was improperly released by New Hampshire authorities. (Tr. Apr. 4, 2004, at 4.) With respect to the sentence underlying the probation revocation, it was to run consecutively after the completion of the Cumberland County sentence. (Id.) With the ten days remaining on that sentence when Ford was released, his court-appointed attorney reasoned, the sentence on the Penobscot County probationary sentence never commenced. (Id. at 5.) Accordingly, the court presiding over the revocation was either influenced by a mistake of fact in assuming Ford was on probation at the time of the alleged probation violation or the court lacked subject matter jurisdiction to revoke the probation. (Id.)

The State argued that at the very least Ford's probation began to run on October 15, 2002, and pointed out that the revocation was filed on October 27, 2002. (Id. at 6.) It was undisputed that the absolute discharge on the Cumberland County sentence, showing a date of October 15, 2004, was not issued by October 5, but was issued by October 27. (Id. at 9-10.) This discharge indicates that Ford was being released to consecutive probations on the Penobscot County sentence and a 1996 criminal matter. Ford admits that upon his release he ran to the West coast because he thought he had "escaped." He explains that he did not turn himself in despite the fact that Maine officials were contacting his mother about the un-served ten days of his sentence because he was also mistakenly released from a consecutive fifteen-year New Hampshire sentence.

A. State's Non-exhaustion and Statute of Limitation Arguments

Ford's petition implicates two of the statutory mechanisms crafted by Congress to gate-keep federal 28 U.S.C. § 2254 review of state-court convictions. First is the exhaustion of state remedies requirement:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
>
> **(B)(i)** there is an absence of available State corrective process; or
>
> **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

Second is the one-year statute of limitation period for filing 28 U.S.C.§ 2254 petitions. This limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1). Ford's probation was revoked on March 31, 2003. This judgment was entered on the docket on April 3, 2003. Ford did not sign the current 28 U.S.C. § 2254 petition until August 12, 2004 (the triggering date under the federal mailbox rule).

1. Exhaustion

With respect to Ford's post-revocation state proceedings, on August 6, 2003, Ford filed a pro se motion to withdraw his plea which appointed counsel later styled as a motion to withdraw admission to motion for probation revocation, or, in the alternative, to correct or reduce sentence. A hearing on this motion was held on April 7, 2004. The superior court judge issued an order dated that same day referring to the motion as being

one to withdraw the guilty plea and denying it. Ford moved for reconsideration and the justice denied the motion for reconsideration.

Ford filed a notice of appeal to the Law Court and the Law Court issued an order on April 30, 2004, that stated:

> Defendant Ford entered a plea of guilty to a charge of burglary on August, 8, 1996. His probation was revoked on March 31, 2003. On August 6, 2003, defendant moved to withdraw his plea. After appointment of counsel and hearing the motion to withdraw the plea was denied on April 7, 2004. Defendant then appealed to the Law Court.
>
> It is hereby ORDERED that the above named appeal be DISMISSED. Review of the denial of a motion to withdraw a plea of guilty filed after the defendant has served the initial portion of his sentence must be sought by means of a petition for post-conviction review.

(Order, Docket No. 04-257 (May 3, 2004).)

Understandably, Ford then filed a petition for post-conviction review on June 2, 2004. The superior court justice issued an order summarily dismissing the petition. Recognizing Ford's argument as a challenge to the propriety of the revocation, the court stated:

> [P]ost-conviction review is a method of review of legality of post-sentencing proceedings. 15 M.R.S.A. § 2121(2). The definition of "post-sentencing proceeding" expressly excludes administrative proceedings resulting in the revocation of probation. 15 M.R.S.A. § 2122; State v. Collins, 681 A.2d 1168, 1170, nn. 5-6 (Me. 1996). Accordingly, as probation revocation does not qualify for review and the one-year statute of limitations period for post-conviction review of the underlying criminal judgment has since expired; the court must dismiss the petition.

(Order Summ. Dismiss Post-conviction Pet. at 2) (footnote omitted). This order was signed August 2, 2004.

In view of Ford's odyssey in the state courts and concerned about a lack of clarity as to what is the right way under Maine law for Ford to satisfy the 28 U.S.C.

§ 2254(b)(1) exhaustion requirement, I ordered supplemental briefing on three questions.[1] The first of these was: "Generally, what is the proper avenue under Maine law for challenging the constitutionality of a judgment revoking probation so as to satisfy the 28 U.S.C. § 2254(b)(1)(A) pre-requisite to federal habeas review?" The State responded: "Discretionary appeal as provided by 17-A M.R.S.A. § 1207 and Maine Rule of Appellate Procedure 19."

As applicable to Ford, § 1207 of title 17-A of the Maine Revised Statutes provides:

> **Superior Court proceeding.** In a probation revocation proceeding in the Superior Court, a person whose probation is revoked may not appeal as of right. The time for taking the appeal and the manner and any conditions for the taking of the appeal are as the Supreme Judicial Court provides by rule.

17-A M.R.S.A. § 1207(2). It is undisputed that Ford did not file a § 1207 appeal. Maine Rule of Appellate Procedure 19 clearly indicates that it covers a discretionary appeal authorized by § 1207(2). Me. R. App. P. 19(a) ¶ 3. Maine Rule of Appellate Procedure 2(b)(2)(A) provides that such a motion must be filed within twenty-one days of entry of judgment. Counting from April 3, 2003, the date the probation revocation judgment was entered on the Superior Court docket, the twenty-one-day period ran on April 24, 2003. Ford did not even file his pro se motion to withdraw his plea until August 6, 2003. Thus, even if appointed counsel, the superior court justice presiding over his motion, or the Law Court had identified 17-A M.R.S.A. § 1207(2) as the proper vehicle for Ford's challenge

[1] The third query was whether 28 U.S.C. § 2254 was available as a vehicle for challenging a state's probation revocation. The State has indicated that in its opinion it is.

to the validity of his plea, Ford would have been well out of time to lodge such an appeal.[2]

Section 2254 movants cannot press claims in the federal court that have been procedurally defaulted in the State courts. As the Fifth Circuit recently explained:

> Procedural default can occur in two ways. First, "[i]f a state court clearly and expressly bases its dismissal of a prisoner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for dismissal, the prisoner has procedurally defaulted his federal habeas claim." [Nobles v. Johnson, 127 F.3d 409, 420 (5th Cir.1997); see also Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that "a procedural default does not bar consideration of a federal claim on ... habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a procedural bar." (internal quotation marks o[]mitted)).] Second, if the prisoner fails to exhaust available state remedies, and the state court to which the prisoner would have to present his claims in order to exhaust them would find the claims procedurally barred, the prisoner has defaulted those claims.

Coleman v. Dretke, __ F.3d __, __, 2004 WL 2943039, *4 (5th Cir. Dec. 21, 2004).

Because Ford's claims fall under the second rubric he cannot now proceed to § 2254 review absent a showing of "cause and prejudice" or a "miscarriage of justice":

> As the Supreme Court reiterated this past term, a federal court will ordinarily not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus "[o]ut of respect for finality, comity, and the orderly administration of justice." Dretke v. Haley, --- U.S. ----, 124 S.Ct.

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[2] As mentioned in the opening paragraph, eleven of Ford's thirteen claims pertains solely to the alleged infirmities with the probation revocation proceeding. Another one of Ford's claims is that the revocation of his probation in 2003 violated his 1996 plea agreement. This challenge threatens to raise an interesting question concerning the running of the § 2244(d)(2) statute of limitations. If the limitation period runs from the imposition of sentence in 1996, the claim is clearly barred. Ford's underlying sentence was imposed on August 2, 1996. No direct appeal or sentence appeal followed and the judgment became final on August 23, 1996, the day following the expiration of Ford's twenty-day period to file such notices. Accordingly, Ford had until August 23, 1997, to file a timely habeas petition, barring some period of tolling for collateral review under section 2244(d)(2). No state post-conviction or other collateral review was filed before that date. Any claim Ford has regarding the original criminal judgment became time-barred on August 24, 1997, the day following the expiration of the one-year period. Ford did not in fact file the current section 2254 petition until August 12, 2004, some seven years too late.

Perhaps such a challenge would fall within subsection (3) of § 2244(d)(1)(D), which provides that "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Assuming that is the case, it is evident that Ford has not exhausted this claim by filing a proper challenge in the state courts prior to filing this 28 U.S.C. § 2254 motion.

> 1847, 1849 (2004). This is a reflection of the rule that "federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." Id. at 1852; see Wainwright v. Sykes, 433 U.S. 72, 81 (1977). The principal exception to this general rule precluding federal review of habeas claims that have been procedurally defaulted is for petitioners who can show "cause and prejudice" for the procedural default or that a "miscarriage of justice" will occur absent review. Cristin v. Brennan, 281 F.3d 404, 414 (3d Cir.2002). An allegation of "actual innocence," if credible, is one such "miscarriage of justice" that enables courts to hear the merits of the habeas claims.

Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004). There is no inkling in this record of a "cause and prejudice" showing vis-à-vis Ford's failure to file any challenge to his probation revocation proceeding until August 6, 2004, (by which time for filing any motion under Maine Rule of Criminal Procedure 32 would have also been untimely as such motion must be made before sentence is imposed).[3] It is also evident that Ford cannot rely on the "miscarriage of justice" exception to default as there is no dispute that he did not report to the probation officer, even after October 15, 2002, instead operating under the theory that he had escaped as a consequence of the error by New Hampshire authorities. In the habeas thesaurus, the windfall of an early release is an antonym to terms such as "miscarriage of justice" and "actual innocence."

2. Statute of limitations

As noted, the State also presses a statute of limitations bar to Ford's attempts to obtain § 2254 review. The problem with granting the motion to dismiss on this ground is the lack of clarity as to whether or not the time during which Ford's motion to withdraw his plea was pending would come within the tolling provision of 2244. For: "The time

[3] As it unfolded, the Superior Court addressed Ford's untimely and improperly brought motion as a motion to withdraw his plea under Rule 32. Although a Rule 35 motion can be brought within a year of the imposition of sentence, there is no way of construing the arguments made by Ford and his counsel in the state post-revocation proceeding as properly lodged thereunder. As it is, Ford never brought the challenge via the proper vehicle 17-A M.R.S.A. § 1207 and the Law Court was never asked to address a challenge to the revocation framed in a manner that was recognizable for what it was.

during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2) (emphasis added).[4] It clearly was a motion that attacked the pertinent judgment. See Godfrey v. Dretke, __F.3d __, 2005 WL 40027 (5th Cir. Jan 10, 2005).

The State believes that Maine Rule of Criminal Procedure 32(d) demonstrates that Ford's motion to withdraw plea was not "properly filed" within the meaning of § 2244(d)(2) because it was filed after Ford was sentenced. There is authority for this position. See, e.g., Long v. Wilson, __ F.3d __, __, 2004 WL 2997890, *2 (3rd Cir. Dec. 29, 2004) (observing that the petitioner's state habeas petition had no effect on tolling because an untimely state post-conviction petition is not "properly filed").

However, despite the evident untimeliness under Rule 32, the superior court allowed Ford to proceed with his motion, appointing counsel and conducting an evidentiary hearing. See Grillette v. Warden Winn Corr. Ctr., 372 F.3d 765, 771 -76 (5th Cir. 2004). The Law Court further complicated the timeliness issue when it summarily dismissed Ford's appeal from the denial of that motion suggesting Ford should have raised his claims in a state post-conviction review petition. I consider the § 2244(d)(2) analysis vis-à-vis Ford's motion to withdraw his plea to be a much trickier proposition than does the State. So, in view of the fact that the State has a clear ground for summary dismissal on the exhaustion question as to all but one of Ford's claims (which I address immediately below), I decline to recommend that the court dismiss the petition for failure to file within the one-year limitation period.

[4] If the motion to withdraw Ford's plea has no § 2244(d)(2) tolling effect, Ford's subsequent post-conviction petition would have no impact on the running of the 28 U.S.C. 2244(d)(1) one-year deadline via 2244(d)(2), because it was not filed until June 2, 2004.

B. Ford's Ineffective Assistance Claim

One of Ford's thirteen 28 U.S.C. § 2254 grounds states that his counsel appointed for the motion to withdraw the plea was ineffective because he did not tell the justice presiding over the motion that Ford had not been informed that he was officially released to probation on October 15, 2002. Ford believes that the justice relied on the fact that Ford was told he was being released to consecutive probation on October 15, 2002, in denying his motion to withdraw his plea. This claim vis-à-vis counsel appointed for the motion to withdraw was not presented to the state courts but it is not at all clear how Ford could have exhausted such a claim. [5]

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[5] In its motion to dismiss the State understandably reads this claim as being an ineffective assistance claim apropos the original revocation proceeding. (Mot. Dismiss § 2254 Pet. at 11.) And in my order for supplemental briefing, I too labored under that assumption. In his pro se motion to withdraw the guilty plea Ford entitled the pleading: "Motion to withdraw guilty plea based on ineffective assistance of council and [because] a mistake of fact at Mr. Ford's hearing was made." He notes, therein that he represented himself at the proceeding with no knowledge of the law and that his detention made it hard for him to adequately investigate and research his case, leading him to proceed under the impression that he was on probation at the relevant time.

At the March 21, 2003, preliminary hearing on the revocation Ford was represented by appointed counsel. At that twenty-six minute hearing counsel represented to the court Ford's position on the revocation. Toward the end of the proceeding counsel indicated that Ford was entering his guilty plea provisionally. (Tr. Mar. 21, 2003, at 17.) Counsel then indicated that Ford wished him to withdraw and that he would like to proceed pro se. (Id.) The justice then explored with Ford the hazards of self-representation. (Id. at 17-19.) When the justice allowed the motion to withdraw, Ford indicated: "I understand what's going on. I'd just like to plead guilty." (Id. at 19.) The justice said he would not accept the plea at the time because he was not so sure that everyone involved actually knew what was going on (id.) (referring to the confusion about what Ford's status was vis-à-vis an unexpired New Hampshire sentence in view of which his release by New Hampshire authorities was also seemingly in error). Yet, Ford insisted, "I do. I know what's going on." (id.) The matter was continued. (Id. at 20.) At the plea and sentencing hearing Ford represented himself. (See Tr. Mar. 31, 2002.) If Ford were bringing a § 2254 claim based on counsel performance at the preliminary hearing then it would at least have to be analyzed as such, assuming it met the gate-keeping requirements. I do not agree with the State that, in light of its argument that Ford had failed to exhaust all of his § 2254 claims, that my query apropos exhaustion of such ineffective assistance claims was "hypothetical." If the State presses non-exhaustion as a bar to federal review then in normal circumstances the Court must address the how and whether of exhaustion.

> Accordingly, in my order seeking a supplemental brief, I asked the State, whether, if a petitioner wishes to bring a claim that counsel who represented him or her in the revocation proceeding delivered ineffective assistance of counsel, could he or she exhaust such a claim in the Maine courts, and, if so, how? Is there not a federal constitutional right to counsel during a probation revocation proceeding? If there is not an avenue for exhausting such a claim does the State agree that 28 U.S.C. § 2254(b)(1)(B) would apply?

Assuming there was a remedy available, § 2254(b)(2) states: "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." Without deciding whether or not Ford even had a federal constitutional right to counsel in such a proceeding, see cf. Matchett v. Dretke, 380 F.3d 844, 849 (5th Cir. 2004) ("We have repeatedly held that ineffective assistance of state habeas or post-conviction counsel cannot serve as cause for a procedural default."), the record reveals that there is no merit to this claim. In ruling on Ford's motion for reconsideration, the presiding justice addressed Ford's assertion that the court had relied on the fact that Ford had actual notice of the discharge notice when the court denied his motion. The court explained:

The State responded that it is not entirely clear whether the Maine Law Court would entertain an ineffective assistance claim brought pursuant to 17-A M.R.S.A. § 1207. It explained:

> [T]he Law Court in State v. Donovan, 1997 ME 181, ¶ 12, 698 A.2d 1045, held that ineffective assistance of counsel claims cannot be reviewed on direct appeal, and must await postconviction review. Whether the Law Court would apply the Donovan rule in a discretionary probation revocation appeal, where the probationer does not have the option of filing a postconviction review petition, remains to be seen.
>
> In the sole reported Maine Law Court case in which a probationer attempted to raise a claim of ineffective assistance of counsel in a discretionary appeal of a probation revocation, the Law Court dismissed the appeal because the probationer failed to properly follow the requirements of the rule. State v. West, 2000 ME 133, ¶ 1, 755 A.2d 517, 517. Nevertheless, the Court in a footnote assumed without deciding that ineffective assistance could be raised in such an appeal, and found (based on its review of the available record) that the evidence of ineffective assistance was totally lacking. Id. at ¶ 2 n. 3, 755 A.2d at 518 n. 3. Thus, West seems to imply that the Maine Law Court could very well review claims of ineffective assistance in a discretionary appeal from a probation revocation if the probationer follows all the requirements of the applicable rules.
>
> If, however, the State is misreading the implications of West and the Law Court would not allow a claim of ineffective assistance of counsel to lie in a discretionary appeal of a probation revocation for all the reasons eloquently expressed in Donovan, then the State would have to agree that the federal court could, pursuant to 28 U.S.C. § 2254(b)(1)(B), grant a writ of habeas corpus because of an absence of available State corrective process if the petitioner made out a requisite ineffective assistance of counsel claim.

(Resp.'s Supplemental Br. at 3-4.)

On a closer reading of Ford's 28 U.S.C. § 2254 petition it is now clear to me that he refers to by name his counsel appointed for purposes of his motion to withdraw his guilty plea not to the earlier counsel at the preliminary hearing on his probation revocation. The only relevance this analysis has to the treatment of this § 2254 petition is that the answer to the question posed could have some bearing on the answer to the question of whether Ford had a way of exhausting his ineffective assistance claim stemming from the motion to withdraw his plea proceedings.

> Actually the court relied in no way upon the Defendant's notice (or lack thereof) of the discharge. The document is referenced in the court's earlier decision because it is an accurate description of the Defendant's status: he was on probation at the time of the offenses noted in the motions for probation revocation. The question of whether he did, or did not, receive a copy of the discharge does not affect his status -- he was on probation at the time of the offenses. His probation commenced upon his discharge from the New Hampshire facility. Accordingly, his motion for reconsideration must be denied.

(Order, Cr. No. 95-314 (Aug. 6, 2004).) It is evident that, to the extent such a claim is cognizable in a § 2254 proceeding, Ford's ineffective assistance claim is without merit. See Strickland v. Washington, 466 U.S. 668 (1984).

Conclusion

Based upon the foregoing, I recommend that the court **GRANT** the State's motion to dismiss and **DENY** Ford's 28 U.S.C. § 2254 petition.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

January 13, 2005.

FORD v. WARDEN, MAINE STATE PRISON
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Date Filed: 08/30/2004
Jury Demand: None
Nature of Suit: 530 Habeas Corpus

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

(General)
Jurisdiction: Federal Question

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